Respondents. Further, the juvenile court's order does not select Respondents. (Pet. App. at 4, 9-10).

Petitioner offered no evidence of the requisite "interdependence" between the government and Respondents, or that Respondents were acting under the authority of the government. Indeed, the evidence below showed that Respondents: (a) never accepted nor received funds from any government agency; (b) never accepted students on referral from federal agencies or state agencies or courts; and (c) accepted students only upon application from the students' parents. There is no evidence in the record to controvert these facts. There is no state action.

Finally, no State could, consistent with the Constitution, utilize Respondents' schools in any meaningful way given their absolute reliance on fundamental Christian religion as "the" basis for their actions and decisions. Such action would be inconsistent with First Amendment principles of separation of church and state. The State was not and is not involved. Respondents were not and could not have been state actors.

B. The Lower Courts Did Not Err In Finding That Respondents Were Not Employers And Petitioner Was Not An Employee Under The Fair Labor Standards Act.

In his first point, Petitioner attempts to contend that he was an "employee" of Respondents under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* (2000). During trial, the district court granted Respondents' motion for judgment as a matter of law at the close of all the evidence, finding that Petitioner was not an employee under the FLSA.

Petitioner claims that this issue should have been submitted to a jury. (Pet. at 8).

Whether or not an individual is an 'employee' within the meaning of the FLSA is a legal determination rather than a factual one. *Icicle Seafoods v. Worthington*, 475 U.S. 709, 714 (1986); *Donovan v. American Airlines, Inc.*, 726 F.2d 415, 417 (8th Cir. 1984)(the question of whether a particular set of facts and circumstances constitutes work under the FLSA is a question for the court to answer).

Under the FLSA, one is employed for performing or working in covered activities and employers must pay the minimum wage for said work. 29 U.S.C. § 206 (2000). The definition of "employ," to suffer or permit to work, was not intended to label all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. "Otherwise, all students would be employees of the school or college they attended, and as such [would be] entitled to receive minimum wages" under the FLSA. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (resident trainees were not employees under the FLSA).

The determination of employment under the FLSA requires satisfaction of an "economic reality" test that views and considers the circumstances of the whole activity. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-27 (1947).

The unrefuted evidence at trial was that Petitioner, like all students enrolled with Respondents, performed chores around the campus that included, laundry, cleaning the dorm,

mowing lawns, clearing brush and painting. These chores were not done off of the campus. They were not offered to the public or in the marketplace, and they were not offered for commercial gain. Rather, the evidence was that the chores were an integral part of the curriculum Respondents offered. The students performed the chores together to develop team-building skills. These activities were intended primarily for the students' benefit, to instill a sense of responsibility, pride and achievement.

Applying the economic reality test to the totality of the circumstances in the evidence, the courts below found that the primary purpose of the chores was educational and that they were not performed for commercial gain. The courts concluded that Petitioner was not an employee as a matter of law, and that there was no way a jury could find that Petitioner was an employee.

Similar results were reached in other cases that have addressed the same issue. *See Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1326-27 (10th Cir. 1981) (dormitory assistants were not employees of a college—the primary objective of the program was educational); *Bobilin v. Board of Educ., State of Hawaii*, 403 F. Supp. 1095 (D. Haw. 1975) (public school students who were assigned "cafeteria duty" were not employees—the purpose of the chore was educational). As a matter of law, Petitioner was not an employee under the FLSA. He failed to make a submissible case that could get to a jury. Therefore, he had no right to have the jury consider his claim.

C. The Eighth Circuit Did Not Err In Finding That Respondents Were Entitled To Summary Judgment On Petitioner's False Imprisonment Claim Because Petitioner Was Enrolled With Respondents By His Parents, Who Had The Authority To Make Decisions Regarding Their Son.

Petitioner alleged that he was falsely imprisoned by Respondents. When Petitioner's parents enrolled him at Mountain Park, he was 16 years old. False imprisonment is a common law state claim. In Missouri, to prove a civil claim of false imprisonment, a plaintiff must demonstrate that the defendant intentionally confined the plaintiff without consent and without legal justification. *Rankin v. Venator Group Retail, Inc.*, 93 S.W.3d 814, 819 (Mo. App. 2002); *Gulley v. Werth*, 61 S.W.3d 293, 296 (Mo. App. 2001) (a psychiatrist was found not to have committed false imprisonment when the plaintiff's husband requested that the plaintiff be committed).

Since Petitioner was 16 and 17 years old during his enrollment, whether he was a minor and whether Respondents had consent from his parents are critical issues to the viability of his claim. The Missouri Legislature authorizes that parents retain rights over a child "under eighteen years of age," and a "minor" is a person who has not attained the age of eighteen years. *See generally* Mo. Rev. St. §§ 211.442, *et seq.* (2000) (actions to terminate or restrict parental rights may be initiated with respect to his or her child, which is defined as individual under the age of 18). Missouri's Probate Code defines a "minor" as "any person who is under the age of eighteen years." Mo. Rev. St. § 475.010 (2000). Regardless of the statute

considered, Petitioner was a minor during the relevant time periods.

Parents have the right to direct the education of their children, including deciding where and how their minor children will be educated. *See Doe "A" v. Special Sch. Dist. of St. Louis Cty.*, 637 F. Supp. 1138, 1146 (E.D. Mo. 1986); *see generally In re Monnig*, 638 S.W.2d 782 (Mo.App. 1982). Indeed, parents may delegate that authority on behalf of their minor child. Mo. Rev. St. § 431.061 (2000); Mo. Rev. St. § 631.105 (2000). Here, Petitioner's parents applied to enroll him with Respondents. The parents completed and signed an application, a limited power of attorney and other documents. Petitioner's parents enrolled him voluntarily and with consent after learning about Respondents' curriculum and program. Petitioner contended that his parents' consent was not informed. However, the record below contains no evidence that the consent was not informed.

Applying Missouri law to the facts, both the district court and the Eighth Circuit found that Petitioner cannot maintain a claim for false imprisonment under Missouri law because his parents had given informed consent for his enrollment. (Pet. App. at 10). This finding was supported by the affidavits of Petitioner's own parents who stated that they "fully understood and agreed with and to the religious, moral and educational principals" [sic] of Respondents. (*Id.*). Petitioner failed to offer material facts to the district court that controverted this finding. When presented with Missouri law on false imprisonment, as well as Missouri's laws on parental rights, the courts below correctly found that summary judgment was appropriate. Therefore, the Petition should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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